1976

Bank of Ephraim v. Halbert Davis et al : Brief of Respondent and Cross-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE

BANK OF EPHRAIM,
a Utah corporation,

Plaintiff-Appellant,

vs.

ALBERT DAVIS, STEVLE KAY
STEINMANN, BABYLON CORPORATION,
PRUDENTIAL FEDERAL SAVINGS,
STATE BANK, UTAH STATE TAX
ION, and UNITED STATES OF

Defendants-Respondents.

BRIEF OF
PRUDENTIAL

APPEAL FROM
IN
THE HONORABLE

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IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF EPHRAIM,
a Utah corporation,

Plaintiff-Appellant,

vs.

HALBERT DAVIS, STEVIE KAY STEINMANN, BABYLON CORPORATION, PRUDENTIAL FEDERAL SAVINGS, FIRST STATE BANK, UTAH STATE TAX COMMISSION, and UNITED STATES OF AMERICA,

Defendants-Respondents.

Case No. 14514

BRIEF OF RESPONDENT AND CROSS-APPELLANT, PRUDENTIAL FEDERAL SAVINGS & LOAN ASSOCIATION

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
IN AND FOR SANPETE COUNTY, UTAH,
THE HONORABLE DON V. TIBBS, JUDGE, PRESIDING

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NATURE OF CASE

CASES CITED

STATUTES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

BANK OF EPHRAIM, a Utah corporation,

Plaintiff-Appellant,

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NATURE OF CASE

The Bank of Ephraim brought a foreclosure action against Halbert Davis based on defaults upon notes secured by mortgages upon two parcels of real property located in Sanpete County, State of Utah, and against the other defendants, each having an interest of record upon the real property. The defendants, other than Halbert Davis, made counterclaims and crossclaims based upon notes secured by instruments of record or liens of record. Judgment was awarded by the Sixth Judicial District Court to the Bank of Ephraim, Babylon Corporation, Prudential Federal Savings & Loan Association, and the Utah State Tax Commission. The Judgment and Decree of Foreclosure specified the amounts to be paid the judgment creditors from the proceeds of the foreclosure sale and the priority of payment.

RELIEF SOUGHT ON APPEAL

Respondent and cross-appellant Prudential Federal Savings & Loan Association prays that the judgment be affirmed as to the priorities on parcels 1 and 2, hereafter the "cafe property," that the Court reverse the trial court's findings of fact, conclusions of law and judgment insofar as the Bank of Ephraim was awarded priority over Prudential Federal Savings & Loan Association in excess of $4,000 on parcel 3, hereafter the "trailer court property," and reverse as to the award of attorney's fees of Prudential Federal Savings & Loan Association, directing the trial court to award attorney's fees consistent with the evidence and with the other findings and conclusions of the trial court.

STATEMENT OF FACTS

Prudential Federal Savings & Loan Association (hereafter "Prudential"), agrees with the Statement of Facts insofar as set forth in the appellant's brief. However, there are additional facts, primarily dealing with the recording order of the various mortgages, which are not stated in appellant's brief, but are set forth below. In addition, this Statement of Facts includes a summary of the facts upon which Prudential relies for its claim of attorney's fees.

The records of the Sanpete County Recorder reflect the following mortgages as to the cafe property in order of recordation:

(1) Halbert Davis to Bank of Ephraim, dated August 7, 1970, recorded August 10, 1970, at Book 150, page 413. On the face of the mortgage, typed on the printed standard form, appears the following language: "This mortgage covers all additional advances on this loan, the total principal amount not to exceed $3,000."

(2) Halbert Davis to Steven Kay Steinmann, dated August 7, 1970, recorded August 10, 1970, at Book 150, page 419, assigned to Babylon Corporation on January 28, 1972, recorded January 28, 1972, at Book 163, page 194. The mortgage secured indebtedness in the amount of $14,500.

(3) Halbert D. Davis to Prudential Federal Savings & Loan Association, dated June 1, 1972, recorded June 22, 1972, at Book 165, page 750. This installment note and mortgage was to secure the amount of $4,073.40.

(4) Halbert D. Davis to Prudential Federal Savings & Loan Association, dated October 16, 1972, recorded October 19, 1972, at Book 167, page 381. This installment note and mortgage secured indebtedness in the sum of $10,228.80, which included the prior installment note and mortgage of $4,073.40 (R. 125-8).

The records of the Sanpete County Recorder reflect the following mortgages as to the trailer court property, in order of recordation:

(1) Halbert Davis to Bank of Ephraim, dated March 15, 1971, recorded March 18, 1971, at Book 155, page 534. The mortgage stated that it secured indebtedness in the amount of $4,000 and contained a provision typed on the face of the Bank's standard form as follows: "This mortgage covers all additional advances on this loan, the total principal amount not to exceed $6,000."

(2) Halbert D. Davis to Prudential Federal Savings & Loan Association, dated June 21, 1972, recorded June 22, 1972, at Book 165, page 750. This installment note and mortgage secured indebtedness in the sum of $4,073.40.

(3) Halbert D. Davis to Prudential Federal Savings & Loan Association, dated October 16, 1972, recorded October 19, 1972, at Book 167, page 381. This installment note and mortgage secured indebtedness in the sum of $10,228.80, which included the prior installment note and mortgage of $4,073.40 (R. 125-8).

In addition to the foregoing, Halbert D. Davis executed mortgages securing indebtedness to First State Bank and several judgments appear of record, all subsequent to the date of the mortgages listed above and not in issue at trial or on appeal.

The Court awarded judgment and assigned the priorities on the cafe and trailer court properties as set

forth in the brief of the appellant. The attorneys for Babylon Corporation, Prudential, Halbert Davis and the Bank of Ephraim testified as to attorney's fees. S. Rex Lewis, attorney for Steven Steinmann and Babylon Corporation, upon cross examination by Udell Jensen, attorney for Halbert Davis, testified as follows:

Q How many hours did you say you had spent?

A Twenty, up until today's date.

Q And is it your usual charge at the office about thirty-five dollars per hour?

A Fifty dollars.

Q And so the balance for that request is based upon the anticipation of service today and subsequent?

A Additional time will be spent.

Q And your figure for today if you charge today by that same rate or by so much per day?

A Yes.

Q You charge two hundred dollars a day, is that what your Court charge is?

A We charge three hundred fifty dollars a day or more. It's usually more if we have to go out of town.

. . .

Q If you calculate it on the usual figures, you would have approximately twenty-three hundred dollars?

A A strictly hourly basis, I will have, approximately 2,000.

(Tr., pp. 29-31.)

Wayne G. Petty, attorney for Prudential, testified as follows:

A As to attorney's fees, the total time spent to date on this matter is thirty-seven and a half hours, certain costs have also been incurred in this matter, twenty-five dollars title search, travel expenses, copies of pleadings and so forth, totaling a hundred and sixty-seven dollars.

THE COURT: Does that include the title search, Mr. Petty?

MR. PETTY: Yes it does, your Honor. I have estimated that the time involved in appearance today would be eight hours, and estimating time to draw findings of fact and conclusions and an appearance at the foreclosure sale, if necessary, would be an additional eight hours, which would be a total of fifty-three and a half hours, that the normal billing rate for those hours is forty dollars per hour, and that is a reasonable fee for those services, and that the attorney's fee would be awarded to Prudential should be based on that hourly figure of forty dollars per hour, which is a total of two thousand one hundred forty dollars.

(Tr. pp. 34-5.)

Udell R. Jensen, attorney for Halbert Davis, testified as to attorney's fees as follows:

That it has been my observation and experience in mortgage foreclosure while there is security that the amount of the attorney's fees bears a relationship to the amount of the obligation; that the obligation amount is graduated from a larger amount, of above twenty-five thousand dollars, generally, at ten percent or less, when you get to the lower amounts like five thousand dollars, that is involved in this particular case, like five to six, that the general rate of taxing that is nearer twenty percent. . . . So far as the matter of Prudential Federal Savings & Loan, I would think their fee would be nearer eleven hundred and twelve hundred would be a reasonable fee to obligate debtor to pay (Tr. p. 71.)

Upon cross examination by counsel for Prudential, Mr. Jensen testified as follows:

Q Is an hourly attorney's fee a reasonable basis for charging fees?

A Consultation for him and his client, I think it is.

Q Now, isn't is true, Mr. Jensen, that the foreclosure proceedings that are involved in this matter as to Babylon Corporation and Bank of Ephraim and as to Prudential Federal Savings & Loan Association are substantially the same?

A You mean the amount of work and effort?

Q Well I mean that partly and I mean just the nature of the foreclosure proceeding itself as set forth by Utah statute and by Utah law; aren't they substantially

A They become substantially the same whenever the defendant commences a cross complaint and becomes substantially the plaintiff as to his own client.

(Tr., p. 75.)

Counsel for Halbert Davis also testified that fees based upon the amount of obligations were based upon:

> [S]ome publications [that] have come across my desk in years gone by referred to credation of secured obligations and unsecured obligations with respect to percentages that were commonly attributed to payment and the obligation upon the debtors who had them. (Tr. p. 72.)

Upon cross examination by counsel for Prudential, Mr. Jensen testified as follows:

Q What's the source of these publications that you refer to?

A Well, I first became experienced in that in connection with the Federal Land Bank of Berkeley and

that's some 25 or 30 years ago, and then became experienced in connection with those handling private lenders at Nephi, Utah, and subsequent to that there would be an occasional mortgage or liens to be foreclosed and then in connection with those matters beginning about six years ago, I represented the Bank of Ephraim for about three years in connection with this foreclosure.

Q Who published these publications that you refer to?

A I can't give you the item. It's too long ago that I saw and I can't give that.

Q So is your testimony based on these publications, the source of which you can't recall?

A No, partially upon that and partially upon my practice and partially on what I have observed others have done.

Q Are any of these schedules that you have referred to based upon a bar schedule?

A I have seen them at the time until I recently had some problems as to whether or not they would be schedule accepted. I don't remember what the Utah Bar is and I haven't looked at it in the --

Q You say a question of whether or not the schedules would be acceptable?

A The courts, as I understand, have been saying that we may not have a fixed schedule as members of our Bar, that we have to have some other standard because of the matter tending to be antitrust or some other basis.

(Tr., pp. 72-3; emphasis added.)

Louis Tervort, counsel for the Bank of Ephraim, upon cross examination by counsel for Prudential, testified as follows:

Q Now, if Prudential Federal Savings & Loan Association were to pay for the amount of attorney's fees on the basis of $40 per hour for the time their

attorney spent on this case, and further assuming that that amount of time was somewhere in the vicinity of 40 hours, would that be a reasonable fee in your judgment.

A I don't think that I would take it as a reasonable fee in this case, no.

Q Would that be too much?

A I am not saying in all cases, but I would say it would not be.

Mr. Tervort also testified that all costs were included in the fees claimed on behalf of the Bank of Ephraim (Tr. p. 91).

The trial court awarded the Bank of Ephraim attorney's fees in the amount of $4,650, Prudential attorney's fees in the amount of $900 and costs of $25, and Babylon Corporation attorney's fees in the amount of $2,000 and costs of $40 (R. 248-53).

ARGUMENT

POINT I

THE TRIAL COURT'S DETERMINATION OF PRIORITIES AS TO THE CAFE PROPERTY IS CORRECT AND PROPER

The priority of the Bank of Ephraim over Prudential Federal Savings & Loan Association is limited to the amount of $3,000, based upon the provision on the face of the mortgage as follows: "This mortgage covers all additional advances on this loan, the total principal amount not to exceed $3,000." By the recording of the mortgage, securing indebtedness in the amount of $2,400, and based on the language quoted above, a subsequent lender is on notice

of the amount of indebtedness and the limitation upon secured indebtedness of $3,000, including the initial indebtedness and subsequent advances. Section 57-3-2, Utah Code Annotated 1953, as amended, provides as follows:

> Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or approved, and certified, in the manner prescribed by this title . . . or a copy thereof, required by law to be recorded in the office of the county recorder shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice. (Emphasis added.)

In Wilson v. Schneiter's Riverside Golf Course, 523 P.2d 1226 (Utah, 1974), this Court referred to Section 57-3-2, U.C.A. 1953. The Court held that where there was an overlap in descriptions of property sold to the plaintiff and defendant by their common seller:

> [P]laintiffs having recorded their notice of purchase prior to the recording of the defendant's deed, the defendant becomes the subsequent purchaser and is deemed to take with notice of the plaintiff's interest. (Footnote omitted; emphasis added.)

(Inasmuch as the issues involved in this matter relate entirely to mortgagees, with no issue as to whether the mortgagees are subject to and entitled to rely upon the provisions of Section 57-3-2, U.C.A. 1953, the objection of the dissent in the Wilson case is not presented.)

It is undisputed that the Bank of Ephraim's mortgage was recorded prior to any interest of the other claimants

in this case. However, the subsequent mortgagees, by virtue of the Bank of Ephraim having recorded its mortgage, had notice of the contents of the Bank of Ephraim's mortgage, and the limitation upon secured indebtedness contained therein. The contents of the mortgage indicate that the mortgage was to secure indebtedness in the amount of $2,400, with a possible additional advance to an amount of $3,000. Subsequent purchasers, mortgagees and lienholders could rely upon the contents of the mortgage in transactions concerning the property.

The Bank of Ephraim is limited as to subsequent mortgagees to the limitations provided in its own documents. The mortgage in favor of the Bank of Ephraim is on the Bank's printed form, with the limitation language added by typewriter. If there is any uncertainty as to the meaning of the provisions of a contract, it is construed against its framer. Seal v. Tayco, Inc., 16 U.2d 323, 400 P.2d 503 (1965); General Mills, Inc. v. Cragun, 103 Utah 239, 134 P.2d 1089 (1943).

This rule, that the limitation contained on the face of the mortgage gives notice to subsequent lienholders and is binding on the mortgagee is stated in a case cited by the Bank of Ephraim in its Brief on Appeal. In Tapia v. DeMartini, 19 Pac. 641 (Cal. 1888), a mortgage on real property secured indebtedness, and by the terms of the

mortgage the indebtedness could include future advances up to $15,000. The Court held the mortgage valid and prior to subsequent encumbrances recorded before future advances were made, such priority up to the amount expressly limited by the mortgage. The Supreme Court of California stated the following:

> [T]he mortgage under which the appellant claims was of record, and was notice to subsequent encumbrancers that it constituted a lien on the property to the full sum of $15,000. They [the materialmen] performed labor on the property, with full notice of the existence of a lien to that amount. (19 Pac. 643; emphasis added.)

In claiming priority over the mortgage of Halbert Davis to Steven Kay Steinmann, the Bank of Ephraim states that the mortgage to Steinmann expressly states that the mortgage is secondary to the mortgage of the Bank of Ephraim. The Bank of Ephraim relies upon the language in the mortgage to Steven Kay Steinmann, but wants to repudiate the language in its own mortgage. References in mortgages that such mortgage is subject to a prior mortgage or that it is a second mortgage have been construed consistently with such provisions, making the mortgage subject to the prior encumbrance. In Summers v. Hallam Cooley Enterprises, 132 P.2d 60 (Cal.App. 1942), the Court held that the words "second mortgage" in a document made the mortgage subordinate to a prior mortgage, in spite of the second mortgagee's claim

that her interest should be prior. See also Anderson v. Barr, 62 P.2d 1242 (Okla. 1937); Richards v. Lawing, 27 P.2d 730 (Wash. 1934). The provision of the mortgage of the Bank of Ephraim, limiting the advances on the loan to $3,000, should be given effect, which would be consistent with the rule of the foregoing cases giving meaning to the language of the recorded documents, which give notice to subsequent lienholders and encumbrancers.

Rules of construction of documents establish that the Bank of Ephraim's claims on appeal are without merit. The first rule of construction applicable here is that the language of the document must be given its plain and ordinary meaning.

In Bonneville Lumber Co. v. J. G. Peppard Seed Co., 72 Utah 463, 271 Pac. 226 (1928), the plaintiff sued for conversion of crops mortgaged by the defendant to secure a promissory note. In construing the mortgage, the Court stated the following:

> It is a cardinal rule of construction, and the first to be applied whenever construction becomes necessary, that, unless technical terms are used, the language must be given its plain, ordinary and obvious meaning. [State v. Davis, 55 Utah 54, 184 P. 161.] If that rule is applied to the instant case, it is unnecessary to make further comment as to the meaning of the language in question here.

The plain meaning of the inserted language is that advances in excess of $3,000 are not secured. The Bank of

Ephraim contends that the provisions that the mortgage is to secure all future advances must also be given effect. However, another rule of construction of documents requires that "where there is a printed form of a contract, and other words are inserted, in writing or otherwise, it is to be assumed that they take precedence over the printed matter." Holland v. Brown, 15 U.2d 422, 394 P.2d 77 (1964). Thus, the inserted limitations on indebtedness to $3,000 take precedence over the printed form language to resolve any inconsistency.

The Bank of Ephraim has failed to cite any authority which deals with the specific question of the effect of the $3,000 limitation in the mortgage upon subsequent mortgagees. In fact, it does not even address this basic problem. The only authorities cited by the Bank of Ephraim bearing even remotely on the issue are several cases in support of the rule that "advances made under a recorded mortgage given to secure further optional advances will not be denied priority in lien merely because the intervening encumbrancer could not have determined from the mortgage, without extraneous inquiry, the true amount of the indebtedness of advances secured thereby." In the present case, no extraneous inquiry is necessary to determine the advances made by the Bank of Ephraim to be secured by the mortgage, because an express limitation appears on the face of the mortgage itself.

Whether the advances to be secured by the mortgage on the cafe property were optional or whether the Bank of Ephraim had actual notice of subsequent mortgages is irrelevant in view of the express limitation contained in the mortgage of the Bank of Ephraim. (However, whether the advances were optional is relevant to the priorities on the trailer court property. See Point II of this Brief.)

The claim of the Bank of Ephraim must be denied in view of General Mills, Inc. v. Cragun, 103 Utah 239, 134 P.2d 1089 (1943), which is so similar to the instant case as to be controlling. In General Mills, the first paragraph of the mortgage contained language that the mortgage is given "as security for the performance of all obligations of the mortgagors herein contained or expressed." The fourth paragraph stated, in part, that the mortgagors would pay "all other sums now or hereafter due or owing from the Mortgagors to the Mortgagee; provided, however, that the maximum amount, the payment of which is secured hereby, is $3,750.00." (Emphasis added.) After stating rules of construction, including the rule that an ambiguity in a document is construed against the drawer, particularly a lender of money, the Court stated its holding:

> We are constrained to hold from a consideration of the contract in its entirety, the contract res and the relation of the parties to each other, that the parties intended by their agreement to enter into a chattel mortgage to secure the sum of not to exceed $3,750 by a lien . . . .

This case requires that this Court deny the claims that the Bank of Ephraim has priority on the cafe property over subsequent mortgagees in excess of the specific limitation of $3,000.

Similarly, in Western Mortgage L. Corp. v. Cottonwood Const. Co., 18 U.2d 409, 424 P.2d 437 (1967), the mortgage provided that it was to secure additional loans made after the date thereof to the owner of the real estate, provided that no additional advancement would be made if it caused the total indebtedness secured by the mortgage to exceed the amount of the original indebtedness. The Utah Supreme Court held that the amount of the mortgage, including advances in an amount less than the original indebtedness and which were made subsequent to improvements made on the property, took priority over mechanic's liens filed against the property resulting from the improvements. In applying the Western Mortgage case to the instant case, where the mortgage of the Bank of Ephraim on its face created a limitation as to the amount which could be advanced, the subsequent mortgage of Prudential takes priority over any advance in excess of the amount specified in the mortgage to the Bank of Ephraim.

In summary, the provisions of the mortgage to the Bank of Ephraim must be given effect, and subsequent mortgagees are entitled to rely upon the provisions thereof in

making subsequent loans secured by the property. The priority of the Bank of Ephraim is limited by the express limitation contained in its own mortgage.

POINT II

THE TRIAL COURT ERRED INSOFAR AS THE BANK OF EPHRAIM WAS AWARDED PRIORITY OVER PRUDENTIAL IN EXCESS OF $4,000 ON THE TRAILER COURT PROPERTY BECAUSE THE EXCESS WAS NOT MANDATORY AND WAS ADVANCED AFTER PRUDENTIAL'S LOAN AND MORTGAGE

On March 15, 1971, the Bank of Ephraim loaned Halbert T. Davis $4,000, secured by a mortgage in favor of the Bank of Ephraim on the trailer court property. Thereafter, on June 21, 1972, Prudential made its loan to defendant Davis, which loan was secured by a mortgage on the cafe and trailer court properties. This loan was superceded by a subsequent loan by Prudential to Davis on October 16, 1972. Finally, on July 31, 1974, the Bank of Ephraim loaned Davis $1,508.41. The additional loan of the Bank of Ephraim to Davis was not mandatory and was advanced two years after its original loan and Prudential's loan secured by the trailer court property.

The predominant rule on the issue of priority where advances are made is that if such advances are optional and not mandatory, then the lien priority for the advances is determined as of the time the advances are actually made. In the present case, the Bank of Ephraim made a loan of $4,000, followed by Prudential's loan and then followed by optional advances by the Bank of Ephraim

two years after Prudential's loan. The optional advances of the Bank of Ephraim are subordinate to Prudential's loan and mortgage.

In National Bank of Washington v. Equity Investors, 506 P.2d 20 (Wash. 1973), a materialman, Columbia Wood Products, Inc., claimed that the construction loan advances of National Bank of Washington and General Mortgage Investment were optional and, thus, subordinate to the advances made by Columbia Wood Products. The Supreme Court of Washington stated the rule as follows:

> If [the advances] were optional, then under the principles adopted by this Court, Columbia Wood Products' lien for lumber delivered and utilized in the apartment house project should be superior to that of the bank's deed of trust insofar as advances made subsequent to the materialman's perfected lien are concerned. If the bank, however, under the construction loan agreement, could have been compelled in the course to advance the monies on the loan, then its lien is totally superior and prior to that of Columbia Wood Products. 506 P.2d at 27, 28.

In finding that the advances of the lenders were optional, the Court cited numerous authorities in support of the rules stated above:

> Thus, we are adhering to what we perceive to be the weight of authority in the rule that, where the advances of promised loan monies are, under an agreement to lend the money, largely optional, that is, where the time and the amount of the monies to be advanced are largely discretionary in the lender, the legal effect of such provisions

> is to bring the transaction under the rule for optional advances rather than the rule governing mandatory advances for the purpose of determining lien priorities. Optional advances under a construction loan agreement, attach when the advances are actually made. Any liens attaching prior to an optional advance would thus be superior to it, and attaching afterwards, junior to it. Elmendorf-Anthony Co. v. Dunn, 10 Wash.2d 29, 116 P.2d 253 (1941); Kimmel v. Batty, 168 Colo. 431, 451 P.2d 751 (1969); Peterson v. John J. Reilly, Inc., 105 N.H. 340, 200 A.2d 21 (1964); Lyman Land Co. v. Union Bank of Benton, 237 Ark. 629, 374 S.W.2d 820 (1964).

In Kimmel v. Batty, 451 P.2d 751 (Colo. 1969), the Supreme Court of Colorado stated the following:

> It is universally held that where a mortgagee is obligated to make advances, he will be protected in his security for the full amount of such advances whether made before or after an intervening lien attaches, and in most jurisdictions it is immaterial whether he had notice of the intervening lien prior to making such advancement . . . . First Federal Savings & Loan Assoc. of Rochester v. Green Acres Bldg. Corp., 38 Misc.2d 149, 236 N.Y.S.2d 1009. In the case last cited, it was held that under a mortgage to secure future advances, '. . .if it is optional with the mortgagee to make or refuse the advances, he will be protected by security of his mortgage only as to the advances made before the attaching of the junior lien or encumbrance.' We approve this rule. (Emphasis added.)

Similarly, in Leche v. Ponca City Production Credit Assn., 478 P.2d 347 (Okla. 1970), the Supreme Court of Oklahoma held that where a prior mortgagee was not obligated for future advances under the real estate mortgage and had actual knowledge of an obligation on the subsequent mortgage, the prior mortgagee could not extend the mortgage to

encompass debts not included originally and could not claim priority of its mortgage to secure advances made after the subsequent mortgage.

The Bank of Ephraim, in its Brief on Appeal, states at page 9: "The plaintiff admits at the beginning that the advances made by the Bank of Ephraim were optional and not obligatory under the mortgage." Therefore, the priority of the Bank of Ephraim as to the trailer park property over Prudential is limited to the $4,000 advanced prior to Prudential's installment note and mortgage. The advance which the Bank of Ephraim claims is prior to Prudential's installment note and mortgage was made more than two years after Prudential's loan secured by the mortgage on the trailer court property.

The Utah case of Utah Savings & Loan Association v. Mecham, 11 U.2d 159, 356 P.2d 281 (1960), aff'd on rehearing, 12 U.2d 335, 366 P.2d 598 (1961), supports the foregoing rule and authorities. In the Mecham case, the issue was the priority of the mortgagee in relation to materialmen whose liens attached after the mortgage, but prior to certain advances made by the mortgagee. Because the findings of the trial court were inadequate for determination of the issues presented, the Supreme Court remanded the case to the trial court for further proceedings. In doing so, the Court said: "Because of the necessity for

further proceedings we hereinafter discuss certain principles of law applicable thereto." Among the principles discussed is the priority issue based on required advances:

> The remaining defendant lien claimants also argue that they shold be permitted to retain the priorities awarded them by the trial court because there was no legally binding agreement between the Mechams as mortgagors and the plaintiff as mortgagee covering the future advances to be made on the obligations and, therefore, the money advanced after those lien claimants had commenced delivering the materials to the properties should be treated as separate transactions, inferior to their lien rights. It is therefore necessary for the trial court to determine when the mortgagee became bound to advance such moneys. . . . It must be appreciated that a mortgagee who is loaning money to a mortgagor-borrower generally is not only entitled but obligated to pay out the money in accordance with the directions of the borrower. 356 P.2d at 284. (Emphasis added.)

That future advances were optional is admitted by the Bank of Ephraim. Thus, the priority which arises where the advances are obligatory, Mecham, supra, does not occur in the case at bar. Therefore, under the rules and authority cited above, the priority of the Bank of Ephraim is governed by the order of its advances in relation to loans of other mortgagees.

The priority of the Bank of Ephraim on the trailer court property is limited to $4,000, the amount of its loan prior to the loan and mortgage of Prudential.

POINT III

THE TRIAL COURT ERRED IN THE AMOUNT OF ITS AWARD OF ATTORNEY'S FEES AND COSTS TO PRUDENTIAL

The trial court's Findings of Fact, Conclusions of Law and Judgment in awarding Prudential attorney's fees in the amount of $900 and costs in the amount of $25 are inconsistent with other Findings and Conclusions of the Court and inconsistent with the evidence introduced.

The uncontradicted testimony from each of the attorneys involved at the trial was that a fee based upon the time spent by the attorney, if charged at a reasonable rate, was appropriate. Udell Jensen, attorney for defendant Davis, when asked if an hourly attorney's fee is a reasonable basis for charging fees, stated "consultation for him and his client, I think it is." The testimony of Louis Tervort, counsel for the Bank of Ephraim, and S. Rex Lewis, counsel for Steven Kay Steinmann and Babylon Corporation, support an award of attorney's fees based upon the time spent on the case. Counsel for Prudential testified that the time spent to the date of trial was 37-1/2 hours, estimated the appearance at the trial to be eight hours, and a possible appearance at the foreclosure sale would be an additional eight hours, for a total of 53-1/2 hours, and that the normal billing rate for the time is $40 per hour. Prudential's counsel also testifed as to costs in the amount of $167.00.

Although the attorney for Halbert Davis stated that a fee based upon an hourly basis is not unreasonable, his testimony was that if the attorney's fees were based on the amount involved in the obligation, a fee based on $5,000 indebtedness would be nearly $1,100 and $1,200.

In spite of the foregoing evidence, the trial court awarded $900 as Prudential's attorney fees and $25 costs. The installment note and mortgage of Prudential (Exhibit 6) obligates the defendant Davis to pay a "reasonable attorney fee in addition to other costs and expenses" upon foreclosure. The narrow question here is what constitutes a reasonable fee and whether the claim of Prudential exceeded a reasonable fee.

In FMA Financial Corporation v. Build, Inc., 17 U.2d 80, 404 P.2d 670 (1965), the Supreme Court reversed the trial court's award of attorney's fees because there was no evidence on which to base the award. The Court stated:

> It is fundamental that the judgment must be based upon findings of fact, which in turn must be based upon the evidence. This rule has been followed by this Court and other jurisdictions in regard to awarding attorney's fees. Because both judges and lawyers have special knowledge as to the value of legal services, this is not always required to be proved by sworn testimony. It is sometimes submitted upon stipulation: as to the amount; or that the judge may fix it on the basis of his own knowledge and experience; and/or in connection with reference to a Bar approved schedule. Any one of these would have provided an evidentiary basis for making the

> determination. However, it was an issue of fact which was denied. Thus it was a part of plaintiff's case to which it had the burden of proving. Failing to offer proof of any character on this issue had the same effect as would the failure to offer proof as to any other controverted issue. There is nothing upon which to base a finding. 404 P.2d 673-74.

FMA Financial indicates that attorney's fees may, but need not, be submitted (1) upon stipulation as to the amount, (2) upon the parties' stipulation that the judge may fix a fee based on his knowledge and experience, or (3) with reference to a Bar-approved schedule. The attorney's fees in the instant case were not submitted on any of the foregoing bases, but rather were proved by sworn testimony.

Although the trial court is in an advantaged position to judge the amount of reasonable attorney's fees, Wallace v. Build, Inc., 16 U.2d 401, 402 P.2d 699 (1965), the finding of the Court must nonetheless be based upon the evidence. FMA Financial Corporation v. Build, Inc., supra. The rule of this Court is that attorney's fees are left to agreement between the attorney and his client, "subject to the right of the Court to discipline the attorney where the fee charged is unconscionable, or advantage is taken of the ignorance of the client." Thatcher v. Industrial Commission, 207 P.2d 178 (1949). In Rudd v. Crown International, 26 U.2d 263, 488 P.2d 298 (1971), the Supreme Court affirmed the trial court's award of $10,000 in attorney's fees

Plaintiff's counsel originally agreed to work for $35 per hour, but as the action progressed and motions and hearings multiplied, the fee was raised to $5,000, then to $10,000. This Court affirmed the award of $10,000, the amount agreed upon by the attorney and his client, as testified to at the trial.

In John C. Cutler Association v. De Jay Stores, 3 U.2d 107, 279 P.2d 700 (1955), the plaintiff appealed an award of $300 attorney's fees. No evidence was introduced at the trial concerning the fees, but the parties stipulated that the trial court could determine the amount to be awarded. The Court stated:

> Under such circumstances, it is permissible for the trial court, who as a lawyer and judge has special knowledge and experience concerning such matters, to take into consideration his own knowledge and to use his judgment as to the value of such services. But there being no evidence for us to review, it is more difficult to appraise the reasonableness of the judgment than if there had been evidence for comparison with it. 279 P.2d at 704.

At the trial of the present case, the issue of attorney's fees was not submitted upon stipulation for determination by the Court, but was rather based on sworn testimony at the trial.

The award of attorney's fees to counsel for Prudential is inconsistent with the award of attorney's fees to counsel for Steven Kay Steinmann and Babylon Corporation.

Steinmann and Babylon Corporation were awarded attorney's fees in the amount of $2,000, whereas Prudential was awarded $900. It is clear that the award to Babylon of $2,000 was based on an hourly basis since counsel for Steinmann and Babylon testified: "A strictly hourly basis, I will have, approximately $2,000." His testimony was that $50 per hour was his usual hourly rate. The testimony of counsel for Prudential indicated 45-1/2 hours, through the trial, not including subsequent time for drawing findings of fact, conclusions of law and appearing at a foreclosure sale. Counsel for Prudential testified that $40 per hour is a normal and reasonable fee for the services provided, which would result in a fee of $1,820. Findings of fact necessarily contrary to each other should not be permitted to stand. Malstrom v. Consolidated Theatres, 4 U.2d 181, 290 P.2d 689 (1955). See West v. West, 16 U.2d 411, 403 P.2d 22 (1965).

The evidence submitted to the Court by each of the attorneys, supports the claim of Prudential of a fee based upon the time spent on the matter. This Court should reverse the trial court's award and direct entry of an award based upon the evidence introduced at trial. The attorney's fee should be at least $1,820, and costs in the amount of $167.00.

CONCLUSION

The trial court's determination of the priorities as to the cafe property is supported by the evidence introduced at trial, is in accordance with law, and should be affirmed. The limitation of $3,000 on the face of the mortgage must be given effect and act as notice to subsequent mortgagees.

The priority of the Bank of Ephraim over Prudential Federal Savings & Loan Association on the trailer court property must be limited to $4,000. The Bank's subsequent advance, made after Prudential's loan and mortgage, was purely optional and thus subordinate to Prudential's loan.

The trial court's award of attorney's fees and costs to Prudential was contrary to the evidence and should be reversed with instructions to enter an award of at least $1,820, with costs of $167.00.

Respectfully submitted this 13th day of August, 1976.

MOYLE & DRAPER

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CERTIFICATE OF MAILING

I hereby certify that on the 13th day of August, 1976, two true and correct copies of the foregoing Brief were mailed to the following counsel of record:

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